89-660

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JULIUS ENGEL,

Petitioner,

v.

CITY OF STOCKTON, CALIFORNIA RALPH WOMACK, RALPH TRIBBLE, LAW ENFORCEMENT PSYCHOLOGICAL SERVICES, INC., MICHAEL ROBERTS, RICHARD WIHERA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JULIUS ENGEL, ESQ.
Petitioner In Pro Per
4044 Birchgrove Way
Sacramento, CA 95826
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QUESTIONS FOR REVIEW

1. Is Summary Judgment proper when the non-moving party has been denied evidence by the lower court within control of the moving party?

2. Is Petitioner entitled to a hearing to clear his name when forced to wear a badge of infamy by a Government subject to the jurisdiction of the United States Constitution, which also interferes with his right to pursue his occupation?

3. Is Petitioner entitled to the documentary evidence which this Government holds which allegedly proves for supports a badge of infamy which interferes with Petitioner's pursuit of his occupation?

4. Is Petitioner's right to Petition a separate and distinct First Amendment right from the Right To Free Speech, and even if, arguendo, his Free Speech claim fails, is he not entitled to appropriate protection under the Right To Petition clause of the First Amendment?

5. Is Petitioner's right to petition only protected to the extent that the said petitioning activity is about matters of public concern?

6. Is Petitioner's psychological reports property within the meaning of the Fifth Amendment?

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OPINIONS BELOW

There are no reported opinions in this case. The opinion of the Court of Appeals for the Ninth Circuit is attached hereto as Appendix C. The opinion of the United States District Court for the Eastern District of California is attached hereto as Appendix B.

On June 1, 1989, the United States Court of Appeals For The Ninth Circuit decided to affirm the United States District Court's (Eastern District of California) order granting Respondent's Motion For Summary Judgment. On July 21, 1989, the Court of Appeals denied Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc. On August 2, 1989, notice of Judgment was served.

The Supreme Court Of The United States has jurisdiction to review the Judgment in question under 28. U.S.C. §1254(1), 2106, and Rule 17(1)(a)(c).

II

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 42USC§1983

Civil Action For Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. **First Amendment To the United States Constitution:**

Courts shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3. **Fourteenth Amendment To The United States Constitution 1:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. **Fifth Amendment To the United States Constitution:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5. **California Government Code §1031(f):**

Be found to be free from any physical, emotional, or mental condition which might adversely affect the exercise of the powers of a peace officer. Physical condition shall be evaluated by a licensed physician and surgeon. Emotional and mental condition shall be evaluated by a licensed physician and surgeon or by a licensed psychologist who has a doctoral degree in psychology and at least five years of post-graduate experience in the diagnosis and treatment of emotional and mental disorders.

This section shall not be construed to preclude the adoption of additional or higher standards, including age.

6. **California Health & Safety Code §25250:**

Legislative Findings, Declarations and Intent

The Legislature finds and declares that every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided. Similarly, persons having responsibility for decisions respecting the health care of others should, in general, have access to information on the patient's condition, and care. It is, therefore, the intent of the Legislature in enacting this chapter to establish procedures for providing access to health care records or summaries of such records by patients and by those persons having responsibility for decisions respecting the health care of others.

III

STATEMENT OF THE CASE

Petitioner filed his complaint in the District Court and invoked its jurisdiction under 28 U.S.C. §1343 to obtain injunctive relief, the costs of suit, including reasonable attorneys' fees, and damages suffered by Petitioner caused by Respondents' violation of his rights as guaranteed by the First, Fifth, and Fourteenth Amendments of the United States Constitution and by federal law, particularly 42 U.S.C. §1983. The Petitioner also made a pendent state claim under California Health & Safety Code Section 25250 et seq.

The order in this case is a final decision and the U.S. Court of Appeals therefore had jurisdiction based on 28 U.S.C. §1291.

Petitioner appealed from the District Court's Order to Set Aside Plaintiff's Entry of Default dated October 20, 1987, and the District Court's Order granting Respondents'

Motion for Summary Judgment and denying Petitioner's Motion for Summary Judgment dated January 20, 1988. Petitioner filed his Notice of Appeal with the U.S. District Court for the Eastern District of California on January 25, 1988, which was timely under F.R.A.P.4(a)(1).

This is an action by Petitioner for violation of his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983. Petitioner also made a pendent state claim under California State Law (Health and Safety Code §252250 et seq.). Petitioner was denied employment as a police officer by Respondents City of Stockon, et al., and also denied the benefit of remaining on their eligible list on the pretext of failing a psychological test administered by Respondent Law Enforcement Psychological Services, Inc., et al. Petitioner was denied a copy of the said report and employment in violation of the above rights.

The Respondent Law Enforcement Psychological Services, Inc. and Michael Roberts failed to file a timely answer and on March 20, 1987, Petitioner had the clerk of the court enter default against them. On May 14, 1988, Appellant applied for default judgment. On July 23, 1987, before the Court's Magistrate, Petitioner's Motion for Default Judgment and Respondents' Motion to Set Aside Default was heard and submitted. On August 3, 1987, the Magistrate recommended the entry of default be set aside. On October 20, 1987, the Court ordered the default to be said aside. On August 19, 1987, Respondents filed a Motion for Summary Judgment or Order to Dismiss, and on August 20, 1987, Petitioner filed Motion for Summary Judgment. On December 4, 1987, the matter was heard in the District Court. On January 20, 1988, the Court granted Respondents' Motion for Summary Judgment. The Court also dismissed Petitioner's pendent state claim without

prejudice.

In December, 1985, Petitioner applied to the Stockton Police Department for the position of police officer. At that time, Petitioner was already a correctional peace officer and a reserve police officer. He had graduated a state recognized law enforcement academy (The Sacramento Sheriff's Academy) in July, 1983.

After being successful in the written and interview exams (placed No. 6 on the eligible list), Petitioner was given a psychological test by Respondent Wihera. This consisted of a written test and an interview. The test was administered at the Police Department. Petitioner was also given a polygraph test by one Ed Lopez.

During the course of Wihera's test, Petitioner was asked had he ever filed a grievance. During the course of Petitioner's polygraph test, he was asked about any lawsuits he had filed. The polygrapher was

told about one small claims action Appellant had filed. In the polygrapher's Report, the "legal" section talks only of Petitioner's civil litigation with not so much as a caveat about a criminal or traffic violation record or a lack thereof. Petitioner was also questioned by his background investigator, one Officer Robert Lee, and was questioned extensively (not on his current experience and education), but where else he has applied and who is he suing. Petitioner was also questioned by Lopez about having been evaluated by Respondent Roberts in the past. Lopez in his recommendation to Appellee City of Stockton Police Department, labels Appellant as a "system fighter" for his willingness to "appeal to the highest levels of authority" and "that the psychologist who is going to examine applicant should be made aware of these problems..."

In February, 1986, Appellant was told that he had failed the background investigation (in

reality none had been completed). A telephonic conversation with Respondent Womack revealed that Respondents' claim Petitioner had really failed the psychological. It was determined after partial discovery that Petitioner in reality was deemed to be "emotionally stable" and "does not present a 'negligent admission' concern to the Stockton Police Department from a psychological perspective." The recommendation goes on to make an unsupported conclusion that Petitioner will have "significant performance problems which are not likely to improve during... probation..." This forces one to the conclusion that Petitioner in fact passed the psychological test but was nevertheless summarily failed. Even Respondent Wihera admits that his function "is to assure psychological stability and suitability for police officer work." This is also stated in California Government Code Section 1031, which is often cited by Respondents. No

psychological problem of Appellant has ever been identified (per Government Code 1031) and Respondent Wihera admits he does not do practical tests for the correct reasoning that they are "not ... psychological test(s)." And that they are "unfair if administered to police officer applicants who had not yet been trained in practical skills." So how on earth is Respondent Wilhera capable of predicting performance skills (especially when no psychological problem is identified)?

In April 1986, Petitioner met with Respondent Womack and Tribble, and one John Moran (City Attorney). There, Moran admitted (and Womack later by Affidavit) that the psychologist is told in advance what kind of personality traits the City wants in an applicant. If psychological tests do not indicate a negligent admission problem, then obviously the recommendation is based on something "Other than the results of the standard psychological tests given to all

police applicants." This subterfuge is compounded by Respondents Tribble and Womack's destruction of the "main psychological report" leaving only the defamatory and conclusory statement of Petitioner's unsuitability for his profession as certified by a licensed psychologist. Respondents admit that this information will be released to future law enforcement employers. The waiver referred to is of no consequence whatever since this is a required formality by all law enforcement agencies, and in this case there is evidence that this information will be disseminated without a waiver, as Respondent Womack who has never spoken to Petitioner before, told Petitioner over the phone that he had failed the psychological and that Petitioner might be an imposter. This report is taken to mean Petitioner is "psychologically unsuitable" for police work. The veracity of any so-called "confidentiality" is essentially non-existent. Respondents falsely state they do not instruct

the psychologist what to do or how to evaluate a candidate.

Petitioner made a timely request for his psychological report in compliance with California Health and Safety Code Section 25252 on April 11, 1986 to Respondent Law Enforcement Psychological Service, Michael Roberts, and Richard Wihera, which was denied by Respondent Wihera on his employer's letterhead on April 22, 1986.

IV

PETITIONER'S RIGHT TO FREE SPEECH AND PETITION HAVE BEEN VIOLATED

It is beyond cavil that the government cannot deny a benefit to a person because he engages in constitutionally protected activity.

> "For at least a quarter-century, this court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests --

> especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which {it} could not command directly.' Such an interference with constitutional rights is impermissible. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

This general principle applies to denials of public employment. See, e.g. Rankin v. McPherson, 97 L.Ed. 2d 315 (1987); Connick v. Myers, 461 U.S. 138 (1983); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Mt. Healthy City Board of Education v. Doyle, 439 U.S. 274 (1977); Perry, 408 U.S. 593; Pickering v. Board of Education, 391 U.S. 563 (1968). Moreover, the principle applies "regardless of the public employee's contractual or other claim to a job." Perry, 408 U.S. at 497; see, e.g. Mt. Healthy, 429 U.S. 274 (nontenured teacher); Rankin, 97 L.Ed. 2d 315 (probationary employee). Thus, although the principle is

most frequently applied to public employees who are terminated, it applies equally to applicants for public employment. See Ramirez v. San Mateo County District Attorney's Office, 639 F. 2d 509 (9th Cir. 1981); see also MacFarlane v. Grasso, 696 F. 2d 317, 223 (2d Cir. 1982) ("government employment may not be denied an applicant because of the applicant's exercise of his right to free speech"); Harris v. Conradi, 675 F. 22d 1212, 1217 (11th Cir. 1982) ("government may not deny a benefit to an individual on the basis of his political beliefs by firing or refusing to hire him"); Gaj v. United States Postal Service, 800 F. 2d 64 (3d Cir. 1986) (refusal to re-hire); Childers v. Dallas Police Department, 513 F. Supp. 134 (N.D. Tex. 1981) (refusal to hire).

Here the Respondents denied Petitioner employment because of their hostility to his exercising his right to petition. The First Amendment includes this right as well as the right to free speech.

The Ninth Circuit in Gearheart v. Thorne, 768 F 2d 1072, 1073 (9th Cir. 1985) considered facts such as these to be free speech issues when considering Petitioner's right to access and use of grievance procedures. The lower court restricts its analysis to Connick infra, and Pickering v. Board of Education, 391 U.S. 563 (1968). As the above-cited cases show, this analysis falls short of what free speech analysis should encompass. The issue of access to the court is itself a matter of public concern. The Gravemen of this cause of action which involves restriction of access to the courts turns not on the nature of the dispute leading Petitioner to seek relief in court, arguably a private concern, but the alleged deprivation of a right to relief, clearly a public concern. The lower court acknowledges on pA32 of its decision that a First Amendment claim is adequately plead but does not analyze the access issue. this case does not turn on the true character of

Petitioner's previous lawsuits but upon these Respondents' belief concerning his previous claims. The government cannot retaliate because an Applicant for employment has availed himself of his right to petition (the subject matter being either public or private).

When the right to petition is at issue, there is no Pickering analysis as the right to petition can encompass both individualized as well as public wrongs. In McCoy v. Goldin 598 F. Supp 310, 315 n.4 (SDNY 1986) the court states:

> "This limitation on speech... does not apply to the right of access to the courts, the central issue in this case. The right or access to the courts cannot be characterized in terms of 'public concern'... the factors considered in... Connick v. Myers 461 U.S. 138 are not transferable to an analysis of an infringement of the right of access to the courts."

As this court states in Mine Workers v. Illinois Bar Association 389 U.S. 217, 223: "The First Amendment does not protect speech and assembly only to the extent it can be characterized as political." Access to the

courts is but one aspect of the First Amendment right to petition, California Transport v. Trucking Unlimited 404 U.S. 508, 510 (1972). See also City of Long Beach v. Bozek (1982) 31 Cal 3d 527, 533-34, 183 Cal.Rptr. 86. See Soto v. City of Sacramento 567 F. Supp. 662, 670 (E.D. Cal 1983); each constitutional right carries its own standard for violation.

The Respondents' conduct is also overbroad in that it penalizes Petitioner because he might sue Respondents at a later date. This also creates a "chilling affect" on Petitioner's rights. In short, Petitioner's use of the courts and grievance procedures is protected under the right to petition as the lower court recognized in Gearheart and Ramirez, supra. These and other cited authorities necessitate a Writ of Certiorari so that Petitioner's right to access can be analyzed, and ultimately reverse the Ninth Circuit's decision and the District Court's order for Summary Judgment.

V.

APPELLANT HAS A RIGHT TO A HEARING TO CLEAR HIS NAME

On the issue of whether Appellant is entitled to a hearing (due process) to clear his name, the Court relies on Brady v. Gebbie 859 F 2d 1543, (9th Cir. 1988), and Paul v. Davis 424 U.S. 693 (1976). The court here incorrectly assumes one must be employed to be damaged in his liberty interest in pursuing one's occupation (See Ramirez supra). This contradicts Myer v. Nebraska 262 US 390 (1923), (Liberty interest in pursuing one's occupation). The criteria used by the court on PA30of its decision applies to the facts of Brady which is a wrongful termination case and at P1552 Brady says "A liberty interest is implicated in the employment termination context..." Emphasis added. The case does not say that one must lost a job to have a liberty interest. Brady just happens to be a wrongful termination case.

The court overlooks Wisconsin v. Constantineau 400 U.S. 433, 437 (1971), which states: Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him notice and an opportunity to be heard are essential." Constantineau lost no job but was entitled to a hearing because a "status" was changed (she could not buy liquor). Paul, supra, cites Constantineau at 708-09; "because of what government is doing to him" and points out Paul lost nothing but Constantineau did; a "status" (See Appellant's brief at P17). Petitioner here lost his position on the police eligible list (a status) and the employment he would have otherwise received (these are tangible losses). These are not the facts of Paul who was not on a track to employment as Petitioner here was. So the conclusion by the Ninth Circuit Court that Petitioner must lost a job in order to be entitled to due process overlooks both the law

and facts of this case. Petitioner is entitled to a fair hearing to clear his name and to the psychological reports used to support the government's claim that he is unfit for this profession. Petitioner must have this evidence in order for the hearing to be fair.

VI

SUMMARY JUDGMENT WAS NOT PROPER SINCE PETITION WAS NOT PERMITTED TO FULL DISCOVERY OF DOCUMENTS

The Court of Appeals failed to analyze Petitioner's issue, that the lower court granted his opposition a protective order preventing discovery of documents in violation of Manley v. Schonbaum 395 U.S. 906 (1969). Summary Judgment was improper because Petitioner was denied access to evidence he diligently pursued, and was under the control of his adversaries. Petitioner needed these documents to properly present his opposition to Summary Judgment.

VII

PETITIONER HAS A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN HIS PSYCHOLOGICAL RECORDS

This Court has held that property is defined by State law in Board of Regents v. Roth 408 U.S. 564, 577 (1972). This court states:

> "To have a property interest in a benefit... he must ... have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

California Health and Safety Sec. 25250 attached hereto plainly states the legislative intent of the California Legislature to allow a property interest in medical records. The lower court splits hairs on p.A28 of its decision because Appellees Law Enforcement Psychological Services does not fall squarely in the list of examples of health care providers enumerated by the statute. Nowhere can the lower court point to a provision of the statute that makes this laundry list an exclusive one.

Further, Coffee v. McDonnell Douglas Corp. 8 Cal. 3d 511 (1972) 105 Cal.Rptr. 358 strongly points to the State of California's position that any health care provider must advise a person he has examined of what might be wrong with him. Part and parcel of this notification must include access to the records showing the condition. It is unthinkable that any American Government can leave a citizen languishing in the enigma of what is psychologically wrong with him as Respondents here have done to Petitioner for over three years.

To date Petitioner still functions well as a law enforcement officer without an inkling of what Respondents say makes him unsuitable for law enforcement from a psychological perspective. It is unimaginable that the United States Constitution supported by the above statutory and case law would not say that the citizen must have access to and have copies of these reports and know what is wrong

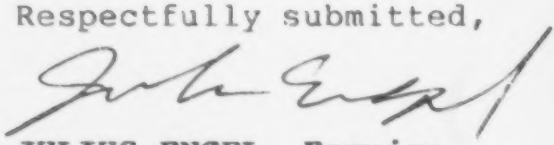
with him or know that he has been the victim of a hoax. Petitioner has a property interest in the copies of this report.

VIII

CONCLUSION

WHEREFORE, is is prayed that this Petition For Writ of Certiorari be granted, and a hearing be had in the Supreme Court of the United States.

Respectfully submitted,



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Petitioner In Pro Per

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIVS-87-0136-MLS EM

JULIUS ENGEL,
Plaintiff,
vs.
CITY OF STOCKTON, et al.,
Defendants.

Filed: September 14, 1987

Before ESTHER MIX, Magistrate, U.S. District Court for the Eastern District of California

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On August 27, 1987, at 10:00 a.m., the cross motions of defendants City of Stockton, et al., and Law Enforcement Psychological Services, Inc., et al, for Protective Order and a Motion to Compel discovery by plaintiff JULIUS ENGEL came before this tribunal. Plaintiff appeared in propria persona; defendants CITY OF STOCKTON, RALPH TRIBBLE and RALPH WOMACK appeared by way of counsel, B. W. McNatt and defendant LAW ENFORCEMENT

PSYCHOLOGICAL SERVICES, INC., appeared by its counsel Lark A. Lucas.

Based on the moving papers herein, and oral argument, it is hereby ordered as follows:

1) The document provided in camera by the City of Stockton, involving letters of reference is not discoverable.

2) A Temporary Protective Order is hereby granted for all further discovery of documents, including psychological data on plaintiff ENGEL, pending the outcome of cross motions for Summary Judgment, now scheduled to be heard before Judge Schwartz on September 18, 1987.

3) If the Summary Judgment motions of defendants are denied, this matter will be recalendared and opportunity given to the parties to file supplemental points and authorities on the issues addressed.

4) The motion and brief on behalf of defendant DR. RICHARD WIHERA is untimely,

since he has not yet been served in this matter.

IT IS SO ORDERED.

Dated: September 10, 1987

Esther Mix
Magistrate, U.S. District
Court for the Eastern
District of California

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIVS-87-0136-MLS EM

JULIUS ENGEL,
Plaintiff,
vs.
CITY OF STOCKTON, et al.,
Defendants.

Filed January 20, 1988

MEMORANDUM AND ORDER

On February 3, 1987, plaintiff filed a pro se complaint against defendants City of Stockton, Ralph Womack and Ralph Tribble (referred to collectively as "the governmental defendants"), and Law Enforcement Psychological Services, Inc., ("LEPS"), Michael Roberts and Richard Wihera (referred to collectively as "the private defendants"). The following factual background is distilled from this rather long, narrative complaint:

In December 1985, plaintiff applied for the position of police officer with the

Stockton City Police Department ("the Department"). He placed number 6 on the eligibility list. In February 1986, plaintiff submitted to a required psychological screening performed by defendant Dr. Wihera, an "agent and/or principal" of LEPS. Complaint at 8:12. Wihera is alleged to have asked plaintiff "questions which appear to be irrelevant to police work." Id. at 3:21-22. Plaintiff answered affirmatively to a question asking whether he had ever filed a grievance. He was also asked questions about "his prior experience in police employment." Id. at 3:28-4:1.

On February 28, plaintiff was advised he had failed to background investigation and was therefore disqualified. Defendant Lieutenant Womack of the Department told him he had failed the psychological test and referred plaintiff to defendant Dr. Wihera. Wihera told plaintiff he recommended the Department not hire plaintiff noting that plaintiff was

terminated by the Miami Beach Police. He later refused plaintiff's written request to release a copy of the psychological report.

On April 9, plaintiff, defendant Womack, defendant Deputy Chief Tribble and a city attorney met and plaintiff was again denied access to the psychological report. The city attorney said that the Department tells Dr. Wihera what type of person it wants as police candidates. Defendant Tribble said that plaintiff's termination from the Miami Beach Department and his attempted employment with other law enforcement agencies were a major concern. Plaintiff tried to present evidence that a psychologist of the Sacramento Police Department examined plaintiff and found him to be "acceptable" but Womack, Tribble and the attorney would not review it. On May 15, plaintiff unsuccessfully petitioned the Stockton Civil Service Commission to overturn the Department's decision.

Plaintiff alleges that defendant Wihera's refusal to release plaintiff's test results prevented him from adequately preparing for the Commission hearing and therefore denied him due process. He further alleges his reputation has been "seriously impuned [sic] and stigmatized," that defendants' actions have impaired his ability to earn a living because of the common practice of law enforcement agencies of sharing employee information. Allegedly, defendants' reliance on plaintiff's supposed "mental unsuitability" was a pretext for denying him employment when the actual reason was "factors such as Plaintiff's filing law suits [sic] or grievances, sexual orientation, and other unknown factors being withheld from Plaintiff." Id. at 7:11-13. The complaint continues:

> Plaintiff is informed and believes and thereon alleges that said Defendants CITY OF STOCKTON and its Police Department have incorporated said arbitrary and illegal

> factors into its psychological portions of its application process and thereby illegally and without due process deny applicants. Finally, said applicants are marked with a status that is embarrassing and difficult to correct if correctable at all.
>
> The above plan and policy of all Defendants have denied Plaintiff his rights to due process and liberty and property as guaranteed by the Fourteenth Amendment to the United States Constitution.
>
> ...
>
> As a proximate result of the Defendants' actions, Plaintiff ENGEL has been deprived of his liberty interest and his right to earn a living as a police officer and property rights.

Id. at 7:13-8:1. Plaintiff seeks $500,000 as punitive damages under the first cause of action.

The second cause of action, which realleges the charges of the first but which appears directed primarily toward the private defendants, sounds in conversion and alleges that these defendants have "deprived plaintiff of his property rights to copies of his psychological reports in violation of California Health and Safety Code §25250

[sic]." Id. at 8:17-19. He claims the court has pendent jurisdiction over this state law cause of action. He seeks punitive damages of $75,000, attorney's fees under Health and Safety Code §25254 and a mandatory injunction ordering these defendants to release the report.

The governmental defendants filed an answer to the complaint on March 2, 1987 denying most of the complaint's allegations and setting forth two affirmative defenses: failure to state a claim and good faith official immunity.

On March 20, the clerk entered defaults against LEPS and Roberts which were subsequently set aside by this court's October 20 order. The private defendants then filed a joint answer to the complaint denying most of the complaint's allegations and setting forth the following affirmative defenses: lack of subject matter jurisdiction, failure to state a claim, failure to exhaust administrative

remedies, laches, statute of limitations and contributory negligence.

On August 19, the governmental defendants moved to dismiss the complaint for failure to state a claim or, in the alternative, for summary judgment, on the grounds that the acts alleged in the complaint do not rise to the stature of a section 1983 violation, that plaintiff expressly waived the rights he is now asserting and that defendants Womack and Tribble are protected by discretionary immunity. On August 20, plaintiff moved for summary judgment. On September 4, the private defendants moved to dismiss the complaint for failure to state a claim, and defendants LEPS and Roberts additionally moved for summary judgment on the grounds that the private defendants were not acting under color of state law, that the type of testing performed has been upheld as constitutional and that the test results are protected under the Freedom of Information Act.

I. ANALYSIS

"Liability under 42 U.S.C. §1983 attaches to any person who, under color of state law, 'subjects or causes to be subjected' any person to a deprivation of protected rights." Merritt v. Mackey, 827 F. 2d 1368, 1371 (9th Cir. 1987). Thus, the two elements of a section 1983 claim are: (1) that defendants must be acting under color of state law; and (2) they must deprive plaintiff of rights secured by the Constitution or federal statutes. Gibson v. United States, 781 F. 2d 1334, 1338 (9th Cir. 1986), cert. denied, 107 S. Ct. 928 (1987). Plaintiff contends defendants have violated his rights to liberty and property without due process of law in violation of the fourteenth amendment. He alleges defendants have deprived him of his property right to certain psychological reports to which he is entitled under the California, Health and Safety Code as well as his liberty interest in his right to earn a

living as a police officer. Moreover, he submits that the reports' finding of mental unsuitability was used as a pretext for denying him employment while the actual reason was because he had filed various lawsuits and grievances.

A. Property Rights

> Property interests . . . are not created by the (federal) Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . .

Board of Regents of State Colleges v. Roth, 408 U.S. 564 , 577 (1972). Plaintiff bases his alleged property right to the psychological reports on Health and Safety Code §25252(a) which provides, in part, that:

> any adult patient of a health care provider ... shall be entitled to inspect patient records upon presenting to the health care provider a written request for those records.

It is doubtful whether plaintiff falls within the definition of "patient" as used in the subdivision; he went to defendant Wihera not to obtain medical care or treatment but to be

evaluated in conjunction with his employment application. There is no case law discussing the statute, nor is the statutory definition of "patient" helpful in addressing the issue raised here.[1] (citation omitted)

Even assuming plaintiff was a "patient" of defendant Wihera, it is doubtful whether his entitlement to inspect his records vests in him a property right protected by the fourteenth amendment. Plaintiff has cited no case holding that an individual has such a property right in medical records. His citation of Coffee v. McDonnell-Douglas Corp., 8 Cal. 3d 551 (1972), is inapposite. In that case, the plaintiff took a pre-employment physical examination. A blood test revealed that his blood sedimentation was abnormally high but the defendant employer's corporate procedure allowed the test results to be filed without evaluation by its doctors; therefore, the plaintiff was to be informed of his disease and suffered damages as a result of the

employer's negligence. The court simply held that when an employer voluntarily undertakes to ascertain whether prospective employees are fit for the job they seek, it must do so with due care. This enunciation of state tort law has nothing to do with whether a prospective employee has a property right to the medical records created as part of a pre-employment examination.

The court finds it need not reach these difficult issues, however. Even assuming plaintiff has a protectable property interest in the records, He knowingly waived his right by signing a release and waiver dated January 21, 1986 stating, in part, "I further understand that I waive any right or opportunity to read or review any background investigation report prepared by the Stockton Police Department." Exhibit 3 to Plaintiff's Deposition filed July 30, 1987, Docket No. 32. Plaintiff responds that this and other waivers signed by him are unconscionable and

unconstitutional, citing Perry v. Sindermann, 408 U.S. 593 (1972), and McKenna v. Fargo, 451 F. Supp. 1355 (D. N.J. 1978), aff'd, 601 F. 2d 575 (3d Cir. 1979), but neither of those cases discusses waiver nor has plaintiff offered any evidence that the waivers were the result of overreaching or bad faith.

B. Liberty Interest

To state a claim for deprivation of a liberty interest, plaintiff must satisfy the so-called "stigma plus" test as articulated in Roth and Paul v. Davis, 424 U.S. 693 (1976).

> That test has two parts. First, the plaintiff must be stigmatized by the State's conduct. Such "stigma" must amount to a charge that is likely to seriously damage the plaintiff's "good name, reputation, honor, or integrity" in the eyes of the community. Second, in addition to the infliction of stigma, a plaintiff must suffer tangible loss in conjunction with the infliction of the stigma.

Albamonte v. Bickley, 573 F. Supp. 77, 80 (N.D. Ill. 1983) (citations omitted).

The Ninth Circuit has described the stigma that infringes liberty interests as that which

"seriously damages a person's reputation or significantly forecloses his freedom to take advantage of other employment opportunities." Jablon v. Trustees of California State Colleges, 482 F. 2d 997, 1000 (1973), cert. denied, 414 U.S. 1163 (1974). "Unpublicized accusations do not infringe constitutional liberty interests because, by definition, they cannot harm 'good name, reputation, honor, or integrity.'" Bollow v. Federal Reserve Bank of San Francisco, 650 F. 2d 1093, 1101 (9th Cir. 1981), cert. denied, 455 U.S. 948 (1982) quoting Bishop v. Wood, 426 U.S. 341, 348 (1975).

The complaint in this case does not allege, nor has plaintiff offered any evidence, that the Department's reason for rejecting his application was ever publicly disclosed. On the contrary, the record suggests plaintiff has not been stigmatized. He is presently a correctional officer for the state and a reserve officer for the City of

Roseville. Plaintiff's Deposition at 8 (filed July 30, 1987, Docket No. 32). He is currently number one on the eligiblity list for the Sacramento Police Department and was number six on the state highway patrol eligibility list until he voluntarily withdrew his application. Id. at 11. The results of the psychological evaluation for the Sacramento Police Department were "acceptable." Id.

Defendants, as moving parties, have discharged their burden of "pointing out to the District Court that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2554 (1986). The burden of going forward thus shifted to plaintiff to designate specific facts showing that there is a genuine issue for trial, and this he has failed to do.

II. CONCLUSION

Accordingly, IT IS ORDERED:

1. That defendants' motions for summary judgment are GRANTED as to the first cause of action;

2. That plaintiff's motion for summary judgment is DENIED; and,

3. That the pendent state law claim embodies in the second cause of action is dismissed without prejudice pursuant to United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

DATED: January 20, 1988.

MILTON L. SCHWARTZ

UNITED STATES DISTRICT JUDGE

NOT FOR PUBLICATION
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIVS-87-0136-MLS MLS

JULIUS ENGEL,
Plaintiff,
vs.
CITY OF STOCKTON, et al.,
Defendants.

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Argued and Submitted March 15, 1989
San Francisco, California

File June 1, 1989

Before: POOLE, BOOCHEVER, and WIGGINS, Circuit Judges

Appellant Julius Engel appeals the district court's order granting appellees' motion for summary judgment and denying his motion for summary judgment in his 42 U.S.C. §1983 (1982) action against the City of Stockton (City) and Officers Ralph Womack and Ralph Tribble (governmental defendants), and Law Enforcement

Psychological Services, Inc. (LEPS), Michael Roberts, the principal of LEPS, and Dr. Richard Wihera, an employee of LEPS (private defendants). Engel brought this action as a result of the governmental defendants' division to reject his application for a position as a police officer based on the psychological evaluation and recommendation of Dr. Wihera. He alleges claims under the first and fourteenth amendments as well as a pendent state-law claim. He also appeals the district court's order setting aside an entry of default against LEPS and Roberts. We affirm both orders.

BACKGROUND

In December 1985 Engel applied for the position of police officer with the Stockton City Police Department (Department). Although he passed the written examination, his application was rejected, in part, based on the recommendation of psychologist Dr. Wihera who performed a background check conducted by the Department. Dr. Wihera recommended that

Engel's application be rejected based on a written test and an interview of Engel. Engel was denied access to the psychological report. Engel successfully petitioned the Stockton Civil Service Commission to overturn the City's rejection of his application.

Engel filed this action on February 3, 1987, alleging a deprivation of his property and liberty interests without due process and a claim under the first amendment. he maintains that Dr. Wihera's refusal to release his test results prevent him from adequately preparing for the Commission hearing, thus denying him due process. Engel further alleges that the records stigmatized his reputation, depriving him of his liberty interest in future employment without due process. In support of his first amendment claim, Engel contents that defendants' reliance on Engel's supposed "mental unsuitability" was a pretext for denying him employment when the actual reason was premised

on "factors such as Plaintiff's filing lawsuits or grievances, sexual orientation, and other unknown factors being withheld from Plaintiff." Engel also alleges a state-law claim of conversion against the private defendants.

On March 20, 1987, the clerk entered a default against LEPS and Roberts. Engel subsequently filed a motion for default judgment, and LEPS and Roberts moved to set aside the default. The motions were referred to a U.S. Magistrate who recommended that LEPS and Robert's motion be granted. Engel failed to file any objections to the Magistrate's recommendation, and on October 20, 1987, the district court adopted the Magistrate's recommendation. Appellees filed a motion for summary judgment. The court denied Engel's motion and granted appellees' motion on the federal claims. The court dismissed the state-law claim without prejudice under United Mine Workers of America v. Gibbs, 383 U.S. 715

(1966). We have jurisdiction under 28 U.S.C. §1291.

ANALYSIS

I. Motion to Set Aside Default

Engel contents that the district court abused its discretion in setting aside the default entry against LEPS and Roberts. The court reviews a district court's decision to set aside an entry of default for abuse of discretion. Alan Neuman Prods., Inc., v. Albright, 862 F. 2d 1388,m 1391 (9th Cir. 1988). Engel's failure to object to the magistrate's factual findings waives the right to contest those findings on appeal. United States v. Remsing, No. 88-3007, slip op. 871, 876 (9th Cir. Jan. 31, 1989) (quoting Orand v. United States, 602 F. 2d 307, 208 (9th Cir. 1979)); United States v. Bernhardt, 840 F. 2d 1441, 1445 (9th Cir.) cert. denied, 109 S. Ct. 389 (1988); Britt v. Simi Valley United School Dist., 709 F. 2d 452, 454 (9th Cir. 1983).

Fed. R. Civ. P. 55(c) provides that a district court may set aside an entry of default "[f]or good cause shown," and that "[i]f a judgment of default has been entered, [the court] may likewise set it aside in accordance with Rule 60(b). . . ." This court has held that "when considering a motion to set aside a default entry, the parallels between granting relief from a default entry and a default judgment encourage utilizing the list of grounds for relief provided in Rule 60(b). . . ." Hawaii Carpenters' Trust Funds v. Stone, 794 F. 2d 508, 513 (9th Cir. 1986). Under rule 60(b), a default judgment will not be disturbed if "(1) the defendant's culpable conduct led to the default; (2) the defendant has no meritorious defense; or (3) the plaintiff would be prejudiced if the judgment is set aside." Albright, 862 F. 2d at 1392. The Rule 60(b) grounds are to be liberally interpreted when applied to a motion for relief from an entry of default. Stone, 794 F. 2d at 513.

The Magistrate found that LEPS and Roberts demonstrated the existence of a meritorious defense to the action, that their neglect in responding to the complaint was excusable because of the confusion over which of two insurance policies provided a duty to defend, and that no substantial prejudice would result to plaintiff by vacating the default. The district court did not abuse its discretion in adopting the magistrate's recommendation and in setting aside the entry of default. The district court's decision to grant summary judgment in favor of defendants demonstrates a meritorious defense, and Engel makes no attempt to demonstrate any prejudice that would result if the default is vacated. Additionally, defendants' conduct leading to the default does not rise to the level of "culpable conduct."

II. SUMMARY JUDGMENT MOTIONS

A. Standard of Review[1] (cites omitted)

A district court's grant of summary judgment is reviewed do novo. Brady v. Gebbie, 859 F. 2d 1543, 1551 (9th Cir. 1988). Summary judgment is proper if the record, viewed in the light most favorable to the non-moving party, shows that no genuine issues of material fact exist and that the moving party was entitled to judgment as a mater of law. Id.

B. Fourteenth Amendment

Engel contends that the district court erred in granting defendants' motion for summary judgment on his claims that he was deprived of his constitutionally protected right to property and liberty without due process.

Property Interest

Engel must show that he has a property interest entitling him to due process, and that he was deprived of that interest without due process. Knudson v. City of Ellensburg, 832 F. 2d 1142, 1145 (9th Cir. 1987). Engel

alleges that he has a property interest in his psychological records. He contends that he was deprived of his interest in the psychological records without due process because without them he was unable to prepare adequately for his appearance before the Civil Service Commission on May 15, 1986.[2](cit.om.)

Property interests are not created by federal constitutional law, but "are created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law. . . ." Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see Brady, 859 F. 2d at 1547-48. Engel bases his alleged property right to the psychological reports on Cal. Health & Safety Code §25252(a) (West 1984) (repealed in 1988 and reenacted as Cal. Health & Safety Code §1795 (West Supp. 1989)), which provides in relevant part: "[A]any adult patient of a health care provider . . . shall be entitled to inspect patient records upon presenting to

the health care provider a written request therefor. . . ." Section 25252(a) does not apply to Engel, however, because neither Dr. Wihera nor LEPS is a "health care provider" as defined under section 25251. LEPS does not constitute a "health facility," "clinic," or "home health care agency" under subsections (a)(1)-(3), and "license psychologist" is not included under subsections (a)(4)-(10). Section 25252(a) is therefore inapplicable and does not entitle Engel access to his records.

The district court properly concluded that the holding in Coffee v. McDonnell-Douglas Corp., 8 Cal. 3d 551, 503 P. 2d 1366, 105 Cal. Rptr. 358 (1972), is inapposite to this case. The Coffee court held that an employer must exercise due care once it decides to evaluate a prospective employee's fitness for a particular job. this holding has no bearing on whether a prospective employee has a property right to medical records created as part of a

pre-employment examination. Engel has therefore failed to establish a property interest in the psychological report. 3/ (citation omitted)

Liberty Interest

Engel also alleges that the district court erred in dismissing his claim that he was denied his liberty interest in future employment without due process. He contends that his "reputation has been seriously inpugned and stigmatized" by Dr. Wihera's report, and that the report will effectively preclude him from securing future employment as a police officer because a prospective department will have access to Dr. Wihera's report.

The procedural protection of due process attendant to a liberty interest claim is not triggered unless "1) the accuracy of the charge is contested; 2) there is some public disclosure of the charge; and 3) the charge is made in connection with termination of employment." Brady, 859 F. 2d at 1552

(quoting Matthews v. Harney County, Or., School Dist. No. 4, 819 F. 2d 889, 891 (9th Cir. 1987)). The district court concluded that Engel failed to offer any evidence that the City's reason for rejecting his application was ever publicly disclosed. On appeal, Engel contends that the fact that the report would be circulated to prospective employers is sufficient to satisfy the publication requirement.

Even assuming a question of fact exists whether the accuracy of Dr. Wihera's report is contested and whether there has been or will be some public disclosure of the contents of the report, there is no question that the report or its contents are unconnected with the "termination of employment". Engel was never employed by the Department and consequently never terminated; the decision of which he complains is the Department's rejection of his application for employment. Engel presents no case which holds that the

liberty interest he asserts is available to a prospective employee who has been denied a job. Indeed, the Supreme Court's decision in Paul v. Davis, 424 U.S. 693 (1976), counsels against characterizing any alleged damage to Engel's reputation as a liberty interest under the due process clause. Id. at 571 ("[R]eputation alone, apart from some more tangible interests such as employment, is [n]either "liberty" or "property" by itself sufficient to invoke the procedural protection of Due Process Clause."); see also Codd v. Velger, 429 U.S. 624, 628 (1977) (per curiam) ("Only if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination is . . . a hearing required."). Summary judgment was therefore properly granted on Engel's liberty interest claim.

C. First Amendment

The district court failed to analyze Engel's first amendment claim. Contrary to

the defendants' contention, the complaint adequately states a first amendment claim. it is, however, without merit. Engel contends that the report's finding of mental unsuitability was used as a pretext by the City for denying him employment; he claims the actual reason his application was rejected was to discourage his practice of filing lawsuits and grievances.

In Pickering v. Board of Education, 391 U.S. 563 (1968), the Supreme Court held that an individual's exercise of his "right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." Id. at 574. "Whether an employee's speech involves a matter of public concern is a question of law," which must be determined by "looking at its content, form, and context in light of the entire record." Roth v. Veteran's Admin., 856 F. 2d 1401, 1405 (9th Cir. 1988) (citing Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

Neither the grievance filed by Engel nor the litigation he initiated was remotely connected with an issue of public concern. His grievance involved a miscalculation of overtime pay by a previous employer, and his litigation involved a claim brought in the Sacramento Municipal Court against two doctors--one doctor refused to extract Engel's wife's teeth because the other failed to send him an extraction order. Engel's first amendment claim must therefore be reject.

II. State-Law Claim

Because summary judgment was properly granted as to the federal claims, the court did not abuse its discretion in dismissing the state-law claim without prejudice under Gibbs. Carnegie-Mellon Univ. v. Cohill, 108 S. Ct. 614, 618-19 & 619 n.7 (1988).

CONCLUSION

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-1630
D.C. No. CV-87-0136-MLS

JULIUS ENGEL,
Plaintiff-Appellant,
vs.
CITY OF STOCKTON, et al.,
Defendants-Appellees.

ORDER
Filed: July 21, 1989

Before: POOLE, BOOCHEVER, and WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing and Judges Pool and Wiggins have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 88-1630

D.C. No. CV-87-0136-MLS

JULIUS ENGEL,

Plaintiff-Appellant,

vs.

CITY OF STOCKTON, et al.,

Defendants-Appellees.

Filed: June 1, 1989

APPEAL from the United States District Court for the Eastern District of California (Sacramento)

THIS CAUSE came on to be heard on the Transcript of the Record from the United

States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

COSTS TAXED

Filed and entered Jun - 1 1989